



2024:DHC:7796



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Reserved on: September 19, 2024  
Pronounced on: October 8, 2024*

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**CS(COMM) 698/2023**

**ITC LIMITED**

**.....Plaintiff**

Through: Mr. Arvind Varma and Mr. Arvind Nayar, Sr. Advs. with Ms. Mamta Rani Jha, Ms. Shrutima Ehersa, Mr. Anuraj Tirthankar, Ms. Samridhi Sharma, Ms. Mahima Chauhan, Mr. Akshay Joshi, Ms. Saloni Agarwal and Mr. Hemant Singh, Advs.

Versus

**ARPITA AGRO PRODUCTS PVT LTD & ORS .....Defendants**

Through: Mr. Jagdeep Kr. Sharma, Mr. Kartikay Sharma, Mr. Arth Arora and Mr. Shashwat Misra, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE SAURABH BANERJEE**

**J U D G M E N T**

**I.A. 19464/2023 (Order XXXIX rules 1 & 2 CPC by plaintiff) & I.A. 21893/2023 (O XXXIX rule 4 CPC by defendant no.2)**

**Narrative Background:**

1. The plaintiff, in a suit for declaration, permanent injunction restraining infringement of trademark, copyright, passing off, unfair competition delivery up, rendition of accounts and damages, has made the present application under *Order XXXI rules 1 & 2* of the Civil Procedure



Code, 1908<sup>1</sup> seeking to restrain the defendants and all those acting on their behalf from infringing upon the marks namely ‘NIMYLE’, ‘JOR-POWR’ and/ or any of the ‘NIM’ family of marks registered in the plaintiff’s name.

2. When the suit, along with the present application, was listed for the first time on 05.10.2023, the plaintiff was able to establish a *prima facie* case for grant of an *ex-parte ad interim* injunction in its favour and thus this Court was pleased to restrain the defendants and any one acting for or on their behalf from manufacturing, selling, offering for sale any cleaning products or any other cognate and allied products under the trademark ‘POWRNYM’ or any other marks which are identical or deceptively similar to the marks ‘NIMYLE’ or ‘JOR-POWR’, as the same amounts to infringement and passing off of the plaintiff’s marks.




3. Subsequent thereto, the defendant no.2 moved an application bearing I.A. 21893/2023 under *Order XXXI rule 4 CPC* seeking vacation of the order of *ex-parte ad interim* injunction dated 05.10.2023. When the said application was listed on 06.11.2023, this Court while issuing notice, directed the defendants to propose new alternative names for the product ‘POWRNYM’ in coordination with plaintiff’s counsel.

4. It is not a matter of dispute that as recorded in the order dated 09.11.2023 passed by this Court, the defendants in fact came up with certain changes in the impugned mark. The same are reproduced as under:-

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<sup>1</sup> Hereafter referred to as “CPC”



S.No.	Name	Logo
1.	SaafGriha	
2.	J.T.	
3.	Jasn	

5. Thereafter, on 11.07.2024 learned counsel for the defendants submitted that *de hors* the earlier orders, he wishes to press his application for vacation of interim injunction. In view thereof, the matter was listed for arguments wherein this Court has heard arguments advanced by both learned counsel for the parties *in extenso* and reserved orders in the present applications.

6. The plaintiff, ITC Limited is a company incorporated under the Companies Act, 2013. It is one of India's most well-known manufacturers and sellers who is engaged in the business of *inter alia* home care products, health and hygiene care, personal care products and other fast-moving consumer goods (FMCG). Some of its products include herbal floor cleaners, soaps, shampoos and body wash, dishwash preparations, vegetable and fruit wash, antiseptic liquid, and handwashes, shower gels, bathing bars, essential oils, body oils, bathing accessories, prickly heat powder, cream, colognes, deodorants and perfume sprays, etc.

7. The defendant no.1 Arpita Agro Products Pvt. Ltd. is a company managed by the defendant nos.2 and 3, who was engaged in the business



of manufacturing and selling the herbal floor cleaners under the trademark 'NIMYLE' and other 'NIM' family of trademarks between 1996 to 2018, which were then assigned by the defendant no.1 to the plaintiff. The defendant no.6 Nilapet is a partnership firm with the defendant nos.4 and 5 as its partners. During the said time, the said trademark 'NIMYLE' and other 'NIM' family of trademarks were packed in a distinctive trade dress, get-up and marketed by the defendant nos.1 to 3 in bottles supplied by the said defendant nos.4 to 6. Besides, the trademark 'NIMYLE', the defendant no.1 was also the registered owner of the trademark 'JOR-POWER'.

8. In fact, the defendant no.1 was the registered owner of the trademark 'NIMYLE' bearing registration no.2148683 in Class 5 and the trademark 'JOR-POWR' bearing registration no.2573451 in Class 3 before the Trade Marks Registry. It were these two trademarks which were assigned by the defendant no.1 to the plaintiff *vide* the following agreements as detailed herein below:-

- i) Asset Purchase Agreement dated 05.04.2018<sup>2</sup> executed *inter se* the plaintiff and defendant nos.1 to 3 whereby, the said defendants assigned, conveyed, relinquished its ownership rights (by virtue of registration and/ or under common law), titles and interests in the plaintiff.
- ii) Brand Assignment Agreement dated 05.04.2018<sup>3</sup> executed *inter se* the plaintiff and the defendant nos.4 to 6 *qua* assignment of the trademark 'JOR-POWR' (word) to the plaintiff.

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<sup>2</sup> Hereafter referred to as "Agreement I"

<sup>3</sup> Hereafter referred to as "Agreement II"



iii) Brand Assignment Agreement dated 19.04.2018<sup>4</sup> executed *inter se* the plaintiff and defendant nos.1 to 3 *qua* assignment of trademarks ‘NIMYLE’, ‘NIMYLE PINE’ (device of flowers), ‘HERBAL NIMYLE’ (device of neem leaves), ‘NEEM NIMYLE CITRO’ (device of flowers) to the plaintiff.

iv) Agreement for supply of products dated 19.04.2018<sup>5</sup> *inter se* the plaintiff and defendant nos.1 to 3 *qua* manufacturing of products bearing the trademarks ‘NIMYLE HERBAL’, ‘NIMYLE CITRO’, ‘NIMYLE PINE’, ‘NIMYLE POPULAR’, ‘NIMYLE ATOMISER’ and ‘NIMYLE AEROSOL’ for the plaintiff, executed initially for a period of three years from 2018-21 and renewed later for subsequent three years 2021-24.

v) Deed of Assignment of Copyright in the artistic works dated 30.04.2018<sup>6</sup> *inter se* the plaintiff and defendant nos.1 to 3 *qua* assignment of all rights, title, copyright and interest in the artistic works comprising stylized versions of the trademark ‘NIMYLE’ to the plaintiff.

vi) Agreement for supply of products dated 09.09.2021<sup>7</sup> *inter se* the plaintiff and defendant nos.1 to 3.

9. Thus, all exclusive ownership rights, title and interest in the trademarks ‘NIMYLE’ and ‘JOR-POWR’ stood transferred by the defendants to the plaintiff, including the know-how, regulatory

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<sup>4</sup> Hereafter referred to as “*Agreement III*”

<sup>5</sup> Hereafter referred to as “*Agreement IV*”

<sup>6</sup> Hereafter referred to as “*Agreement V*”

<sup>7</sup> Hereafter referred to as “*Agreement VI*”



information, advertising materials and all formulations, specifications, manufacturing processes, quality processes and design rights.

10. Subsequent to execution of the aforesaid agreements between the plaintiff and the defendants in 2018, the plaintiff has spent tremendous time, effort and resources for promoting and marketing the trademark 'NIMYLE' and other 'NIM' family of trademarks *via* print and electronic media as also social media in India and worldwide as also made huge investments in promoting and popularizing the herbal floor cleaners marketed under the said trademarks as also other 'NIM' family of trademarks such as NIMEASY and NIMWASH.

11. So much so, till the institution of the present suit, the plaintiff has recorded total sales turnover of Rs.408.9 Crores in the last five years and Rs.26.3 Crores in the last three years as also expended Rs.61.9 Crores in the last five years and Rs.23.4 Crores in the last three years for promoting the products under the said registered trademarks 'NIMYLE' and 'NIMEASY and NIMWASH' respectively. The aforesaid shows that plaintiff's goodwill and reputation thereon.

12. On 24.08.2023, the plaintiff first came across an advertisement in the newspaper 'The Telegraph' and then again on 28.09.2023 across another advertisement in the newspaper 'The Times of India' for a floor cleaner under the mark 'POWRNYM' marketed by the defendant no.1. Investigations thereafter revealed that the defendant nos.1 to 3 were also offering for sale the said products under the impugned trademark 'POWRNYM' on its website *www.arpitaagro.in*. The plaintiff later on learnt that the defendants also applied for registration of the mark



‘POWRNYM’ by way of trade mark application nos.5083105 in Class 3 and 5083106 in Class 5 respectively.

13. In light of the aforesaid, the plaintiff has instituted the present suit along with the present application for seeking grant of an *ad-interim* injunction against the defendants.

**Submissions of plaintiff:**

14. As per pleadings before this Court and arguments addressed in support thereof by the learned Senior counsel(s) for plaintiff, the case of the plaintiff is as under:-

14.1. The plaintiff is the owner of the registered trademarks ‘JOR-POWR’, ‘NIMYLE’ and NIM Family of Marks (NIMEASY, NIMWASH, NIMGLO, NIMKLIN) by virtue of *Agreement I to Agreement III* executed by the defendant nos.1 and 6 in its favour. Needless to say, the same has been duly recorded before the Trade Marks Registry. Thus, the plaintiff is the exclusive owner of marks ‘NIMYLE’ and ‘JOR-POWR’ which were earlier belonging to the defendants.

14.2. Vide *Agreement I*, the defendant no.1 irrevocably assigned all rights, title and interest in the designated registered trademarks (including NIMYLE and the rest of the NIM Family of Marks), know-how, regulatory information, design rights relating to the production and manufacture of floor cleaners, insect repellents, toilet soaps, liquid handwash and scouring bars to the plaintiff as also not to “... ..*use or apply... ..*” for any mark that is “... ..*confusingly similar, visually or phonetically... ..*” to the assigned trademarks in terms of *Clause(s) 1.1 (xlv), 2.1, 9.10 and Annexures A and C* thereof. Therefore, the intent of the parties was to prevent the subsequent adoption thereof.





14.3. Then, vide *Agreement II* the defendant nos. 4 to 6 irrevocably assigned the trademark ‘JOR-POWR’ along with all rights to prepare derivative marks to the plaintiff in terms of *Clause 1* and *Annexure A* thereof.

14.4. Then, vide *Agreement III* the defendant no.1 irrevocably “...  
...assigned all rights, title, and interest including all rights to prepare derivative marks, along with the goodwill in and to the said Trademarks...  
...” in terms of *Clause 1* and *Annexure A* thereof. Thus, the NIM family of marks were also included.

14.5. Thereafter, vide *Agreement V* the defendant nos. 1 and 2 undertook not to create, use or register any similar artworks in terms of the *Recital*, *Clause 4* and *Schedule of Artworks* thereof.

14.6. Thereafter, vide *Agreement IV* the defendant no.1 was to manufacture, package and supply products under ‘NIMYLE’ for the plaintiff, which was later on renewed by vide *Agreement VI* and since terminated by the plaintiff on account of the defendants’ unlawful acts.

14.7. It is the case of the plaintiff that the use of the impugned mark ‘POWRNYM’ and the impugned trade dress by the defendants is against the terms of the assignment(s) made by them in favour of the plaintiff, the commercial probity and the fairness. In fact, the defendants have a higher obligation on account of the fact that the plaintiff has obtained all rights *qua* the registered trademarks ‘JOR-POWR’, ‘NIMYLE’ and NIM Family of Marks (NIMEASY, NIMWASH, NIMGLO, NIMKLIN) for a consideration of Rs.100 Crores.

14.8. Despite the aforesaid, the defendant no.1 has clandestinely applied for registration of the mark ‘POWRNYM’ under application no.5083105





in Class 3 and application no.5083106 in Class 5 respectively, which, though was inadvertently missed by the plaintiff, however, has currently been opposed. Be that as it may, the filing of the aforesaid applications by the defendants is in clear violation of their obligation to not use or apply for any trademark which is/ are deceptively similar to those assigned to the plaintiff or to prepare derivative marks of those assigned to the plaintiff.

14.9. The impugned mark 'POWRNYM' of the defendants is derivative of the registered trademarks 'NIMYLE' and 'JOR-POWR' belonging to the plaintiff since they have lifted 'POWR' from the registered trademark 'JOR-POWR' and 'NIM'/ 'NYM' (mis-spelled but having identical pronunciation) from the registered trademark 'NIMYLE' of the plaintiff. As such, the impugned mark 'POWRNYM' is deceptively similar. Further, the defendants have also dishonestly imitated the trade dress including the get-up, identical shape of bottle and label as that of the plaintiff's products under the registered trademark 'NIMYLE'.

14.10. Such an adoption by the defendants cannot be innocuous/ *bona fide* rather, is a deliberate act to ride upon the goodwill and reputation of the plaintiff's registered and well-known trademarks 'NIMYLE', 'JOR-POWR' and NIM family of marks and create an injurious association in the minds of consumers that the impugned mark is a latest entrant in the NIM family of marks. Reliance is placed upon *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Laboratories*<sup>8</sup>, *Cadila Health Care Ltd. v. Cadila*

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<sup>8</sup> AIR 1965 SC 980



*Pharmaceuticals Ltd.*<sup>9</sup>, *Laxmikant Patel v. Chetanbhai Shah*<sup>10</sup>, *Amar Singh Chawal v. Shri Vardhman Rice & Genl. Mills*<sup>11</sup>, *South India Beverages v. General Mills Marketing*<sup>12</sup> and *Greaves Cotton Limited v. Mr. Mohammad Rafi & Ors.*<sup>13</sup>.

14.11. Admittedly, the defendants are the erstwhile owners and manufacturers of ‘NIMYLE’ floor cleaners since 1996 until the execution of the aforesaid agreements with the plaintiff in the year 2018. Even after the execution of the aforesaid agreements, the bottle and trade dress used for ‘NIMYLE’ remained unchanged and it is the defendants who were the manufacturers and bottlers of ‘NIMYLE’ floor cleaners until the plaintiff was constrained to institute the present suit and terminate the supply agreement till late.

14.12. The trade channels and general public have historically associated the said trade dress with the ‘NIMYLE’ brand and source thereof with its owner, which is now the plaintiff, and previously the defendants. In such a situation and in view of what has been held in *BK Engineering v. UBHI Enterprises*<sup>14</sup>, *TV Venugopal v. Ushodaya Enterprises*<sup>15</sup> and *Midas Hygiene v. Sudhir Bhatia*<sup>16</sup>, the defendants’ use of the impugned trade dress enhances the risk of injurious association and confusion of the defendant’s ‘POWRNYM’ floor cleaners with the plaintiff’s goods under ‘NIMYLE’, ‘JOR-POWR’ and the NIM family of marks.

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<sup>9</sup> (2001) 5 SCC 73

<sup>10</sup> 2002 (3) SCC 65

<sup>11</sup> ILR (2009) VI Delhi 399

<sup>12</sup> 2014 SCC Online Del 1953

<sup>13</sup> 2011 SCC OnLine Del 2596

<sup>14</sup> AIR 1985 DEL 210

<sup>15</sup> 2011 4 SCC 85

<sup>16</sup> 2004 3 SCC 90



14.13. The claim of the defendants that ‘NYM’ is descriptively used to indicate ‘NEEM’ as a constituent, and that plaintiff has no exclusive right over the suffix and prefix is frivolous as the defendants initially claimed that other products sold in the market under the name NIM or NEEM indicate ‘neem’ as a constituent, however, the advertisement in ‘The Telegraph’ dated 24.08.2023 constitutes the same to be “Synonym of Power”. Moreover, in view of what has been held in *RN Gosain v. Yashpal Dhir*<sup>17</sup> and *Automatic Electric Limited v. R. K. Dhawan*<sup>18</sup>, the defendant no.1 itself has applied for the mark ‘POWRNYM’ thus, cannot claim that ‘NYM’/ ‘NIM’ is generic or common to trade.

14.14. The defendants’ reliance on the expiry of non-compete clause on 06.04.2022 as a ground is misplaced, as the issue is not with respect to the defendants’ carrying on business in the same field, but the adoption of a deceptively similar derivative mark, trade dress, packaging, label and identical shape of bottle. Further, that the defendants had irrevocably assigned the right to prepare derivative marks and undertaken not to adopt a confusingly similar mark(s), an obligation which cannot be extinguished on expiry of non-compete period in terms of Clause 9.9 of *Agreement I*. In fact, Clause 11.1 of *Agreement I* thereof provides that the accrued rights and obligations continue to subsist even after termination.

15. In the wake of the above, the plaintiff is seeking passing of an *ad-interim injunction* against the defendants till disposal of the present suit.

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<sup>17</sup> AIR 1993 SC 352

<sup>18</sup> 1999 SCC OnLine Del 27



**Submissions of Defendants:**

16. As per pleadings before this Court and arguments addressed in support thereof by the learned counsel for all the defendants, the case of the defendants is as under:-

16.1. The impugned mark 'POWRNYM' of the defendants is distinct and not similar to the plaintiff's marks 'NIMYLE' and 'JOR-POWR'. It does not infringe upon the proprietary rights of the plaintiff.

16.2. Admittedly, since the defendants began marketing its product under the impugned mark 'POWRNYM' after the expiration of the non-competition clause as entailed under the *Agreement* on 06.04.2022.

16.3. Since neither of the parties herein have ever used the trademark 'JOR-POWR' at any stage whatsoever, there is nothing available in the market under the said trademark.

16.4. The plaintiff never raised any objections qua the impugned mark 'POWRNYM' before the Trade Marks Registry prior to filing of the present suit despite it being advertised in the Trade Marks Journal much prior on 06.09.2021 as it waited for the defendants to significantly invest its resources in production and brand building qua the same.

16.5. Adopting the impugned mark 'POWRNYM' is as a result of a common industry practice of adding prefixes and suffixes. In any event, there is a huge difference in the composition, branding, and packaging *qua* the products of the plaintiff and the impugned product of the defendants thus, preventing any similarity and confusion.

16.6. The artwork, physical attributes such as height, diameter, and weight of the two products is different and distinct, showcasing *bona fide* intentions of the defendants in adopting the impugned mark



‘POWRNYM’. The impugned mark ‘POWRNYM’ stands apart both phonetically and visually, with ‘POWR’ carrying inherent meaning, unlike the mere prefix ‘NIM’ found in ‘NIMYLE’.

16.7. Furthermore, the intentional inclusion of ‘NYM’ in ‘POWRNYM’ serves to evoke associations with power, thereby accentuating its unique identity. Additionally, the defendant’s advertising also explicitly states, “YOUR POWER MY POWER, only ‘POWRNYM’ synonym of POWER,” underscoring the unique significance and independent identity of ‘POWRNYM’. This deliberate choice in messaging establishes a clear separation in the use, meaning, and emphasis of the word ‘POWRNYM’, emphasizing its singular and meaningful existence. Reliance is placed upon *Rhizome Distilleries (P) Ltd. v. Pernod Ricard S.A. France*<sup>19</sup>.

17. In the wake of the above, the defendants oppose grant of an order of *ad-interim injunction* in favour of the plaintiff and against themselves.

18. This Court has heard the submissions advanced by the learned counsel for the parties and gone through the pleadings as also perused the documents on record.

**Reasons & Analysis:**

19. As clear from the aforesaid, *admittedly*, both parties are engaged in the manufacturing and selling of herbal floor cleaners. Before proceeding and for the sake of clarity, given herein below are the pictural representations of both the competing products involved herein:-

Plaintiff’s Prior Registered Trade Marks	Defendant’s Mark
NIMYLE JOR-POWR	POWRNYM

<sup>19</sup> 2009 SCC OnLine Del 3346





NIMYLE	POWRNYM
	

20. Also, since of the various agreements, the *Agreement I*, *Agreement II*, *Agreement III* and *Agreement IV* form the very genesis of the disputes involved herein, the relevant clause(s) thereof are reproduced as under:-

**Agreement I**

***Clause 1.1:***

*“Trade Marks” shall mean trademarks, service marks, trade dress, trade names, logos, brand names and other similar marks or insigne used by AAPPL for the Business and includes:*

*a) registered trademarks as set out in Annexure A hereto;*



- b) trademarks applied for and pending registration as set out in Annexure B hereto;
- c) trademarks, trade dress, get-up and labels used by AAPPL in relation to the Trade Marks set out in Annexures A, B and I hereto;
- d) any and all common law rights in, or to, the trademarks Set out in (a), (b) and (c) immediately above;
- e) all goodwill associated with any of the items in sub-clauses (a), (b) and (c) immediately above; in each case owned by, used by, and/or applied for, by AAPPL and/or any Affiliate of AAPPL, from time to time in the Territory, details of which are set out in Annexures A, B and I hereto.”

**Clause 2.1:**

“Upon the terms and subject to the conditions set forth herein, on the Closing Date, AAPPL shall, irrevocably sell, convey, assign, transfer and deliver (as the case may be), and ITC shall outright purchase, acquire and accept from AAPPL, all rights, title, property and interest of AAPPL (existing as of the Closing Date), free of all Encumbrances, in and with respect to, the assets set forth below (“Transferred Assets”):

a) the Trade Marks;

b) the Knowhow;

c) the Regulatory Information related solely to the Products in the Territory, to the extent transferable;

d) the Advertising Material; and

e) all the formulations, specifications, manufacturing processes (including any seasonal variations in such processes), quality processes and design rights (if any), relating to the production/manufacture of products which are in the pipeline (that is, for which pilot scale production has been initiated in the Manufacturing Premises), and which are related to the Products (collectively, “Pipeline Knowhow”);

For the purposes of this clause, “Encumbrances” shall exclude the list of oppositions filed against any of the Trade Marks which are detailed in Annexure B hereto.”

**Clause 9.5:**

“AAPPL undertakes that it shall not challenge the validity or assist any third party in challenging the validity of the Intellectual Property assigned or transferred to ITC at Closing.”

**Clause 9.9:**

“AAPPL acknowledges and agrees that it shall not, and that its Affiliates, directors, promoters, officers, or any Relatives thereof shall not, directly or indirectly, be involved in the manufacture, packaging, testing, development, marketing, distribution, or sale of any products that compete, directly or indirectly, with any of the Products in the





Territory for a period of four years from the Closing Date, except if such activities are carried out pursuant to an agreement with ITC, or with prior written consent of ITC. Provided, however, that AAPPL shall be free to manufacture and market soaps, liquid handwash or insect repellent for use in agriculture without infringing and/ or passing off the intellectual Property rights of ITC.”

**Clause 9.10:**

“AAPPL shall not use, nor apply for registration of any Trade Marks that are part of the Transferred Assets or any trademarks that are confusingly similar, visually or phonetically, to the Trade Marks, and will not withdraw any existing applications for Trade Marks which are pending registration.”

**Agreement II**

**Clause 1:**

“The Assignor does hereby irrevocably assign to the Assignee, all rights with respect to the said Trademarks listed in **Schedule A** of this Brand Assignment Agreement in India, in perpetuity and free from all encumbrances. The Assignor also acknowledges having assigned all rights, title and interest including **all rights to prepare derivative marks** along with the goodwill in and to the said Trademarks.”

**Agreement III**

**Clause 1:**

“The Assignor does hereby irrevocably assign to the Assignee, all rights with respect to the said Trademarks listed in **Schedule A** of this Brand Assignment Agreement in India, in perpetuity and free from all encumbrances. The Assignor also acknowledges having assigned all rights, title and interest including all rights to prepare derivative marks, along with the goodwill in and to the said Trademarks. The Assignor also acknowledges having assigned all rights, title and interest in and to the Knowhow to the Assignee.”

**Agreement IV**

**Recital Clause:**

“NOW THIS DEED OF ASSIGNMENT WITNESSETH that, in pursuance of the said Assignment, mutual understanding and adequate and valuable consideration, paid by the Assignee to the Assignor (receipt whereof is hereby acknowledged by the Assignor as the full and complete consideration for assignment of copyright in the said artworks assigned herewith), the Assignor hereby ASSIGNS AND TRANSFERS unto the Assignee, wholly and absolutely, as from the Effective Date, all RIGHTS, TITLE, INTEREST, BENEFIT, CLAIMS, in respect of the copyright which forms a part of the said artworks, including common



law rights, with the exclusive, absolute right to use and reproduce the said artworks in any material form by any means, including photography, printing, video, electronic mode and any other medium or mode in existence as of the Effective Date and to make any adaptations thereof in any form and to use the said artworks in any manner and TO HOLD the same unto the Assignee absolutely and forever and the PARTIES HERETO COVENANT THAT:"

**Clause 4:**

"The Assignor relinquishes all right(s), title(s), interest(s), demands in and to the said make and undertakes to not do any act or omission which may jeopardize and / or disturb and / or cause any kind of interference in the peaceful enjoyment of ownership in the said artworks by the Assignee and shall not use or register or create or cause to use, register and create the said artworks or any artwork similar to the said artworks."

21. Admittedly, both parties are *ad idem* that the aforesaid agreements executed *inter se* them. There is not dispute/ denial qua any of the terms contained in any of them. Therefore, in essence there is no dispute *qua* the fact that there was an irrevocable assignment of the trademarks by the defendants in favour of the plaintiff and furthermore that the right to prepare the derivative marks and the perpetual undertaking not to use or apply for confusingly similar marks have been passed on to the plaintiff by virtue thereof.

22. Further, it cannot be in dispute that since the defendants were the erstwhile owners of the registered trademarks 'NIMYLE' and 'JOR-POWR'; and had in fact been using the registered trademark 'NIMYLE' since the year 1996 till the execution of the aforesaid agreements in the year 2016, that too under the identically similar bottles with the very same get up, style and shape; and had in fact sold both of them to the plaintiff for a valuable consideration of Rs.100 Crores, they were not only fully



aware of the existence thereof but of the goodwill and reputation attached to them.

23. Once the defendants have assigned/ given up their right, title and interest in and to both the registered trademarks 'NIMYLE' and 'JOR-POWR' to the plaintiff and that too against a valuable consideration of Rs.100 Crores, they were/ are unequivocally left with nothing qua either of them.

24. Under such circumstances, the defendants ought to have given the basis, much less an explanation and/ or a reasoning for its having adopted the impugned mark 'POWRNYM' which is identically similar to the registered trademarks 'NIMYLE' and 'JOR-POWR' in the identically similar bottles having the very same get up, style and shape as that of the plaintiff's products offered/ sold under the registered trademark 'NIMYLE'.

25. The defendants have totally remained silent about the adoption of the impugned mark 'POWRNYM'. Moreover, though the defendant no.1 in its written statement initially claimed that the impugned mark 'POWRNYM' uses prefixes and suffixes that are not exclusive to the plaintiff's registered trademarks 'NIMYLE' and 'JOR-POWR' as also that the products are sold under the name of 'NYM' or 'NEEM' to indicate 'NEEM' as a constituent thereof, however, in its rejoinder to the application under *Order XXXIX rule 4 CPC* filed by the defendant no.2, the contrary stance taken by them is that 'POWR' stands for 'POWER' while 'NYM' is representative of 'NAME' meaning thereby, that the impugned mark 'POWRNYM' is another name for 'POWER'. Even otherwise, the defendants cannot seek to claim that NIM/ NYM are



derivative of NEEM and/ or are common to the trade since it is the very same defendant no.1 who has itself chosen to apply for registration of its impugned mark 'POWRNYM' before the Trademark Registry.

26. Reliance is placed upon *RN Gosain v. Yashpal Dhir*, AIR<sup>20</sup> and *Automatic Electric Limited v. R. K. Dhawan*<sup>21</sup>, wherein it has been held that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.

27. However, considering the past history involving the defendants being the erstwhile owners of the registered trademarks 'NIMYLE' and 'JOR-POWR', who were using the registered trademark 'NIMYLE' for almost *twenty years* till the execution of the aforesaid agreements in the year 2016 and who had sold them for a valuable consideration of Rs.100 Crores to the plaintiff for all times to come, none of the so-called reasoning of the defendants appeal to the conscience of this Court. On the contrary, in the considered opinion of this Court, it is hard to believe that the impugned mark 'POWRNYM' of the defendants is not a derivative of the registered trademarks 'NIMYLE' and 'JOR-POWR' of the plaintiff.

28. Therefore, under the peculiar facts and circumstances, it is highly implausible to expect that the competing marks involved are not phonetically, structurally, visually and otherwise identically similar to each other. They need not be so in all cases, particularly, when the issues involved are of the present nature herein. Even otherwise, the impugned

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<sup>20</sup> 1993 SC 352

<sup>21</sup> 1999 SCC OnLine Del 27



impugned mark 'POWRNYM' of the defendants is a combination/ derivative/ amalgamation of the registered trademarks 'NIMYLE' and 'JOR-POWR' of the plaintiff it is sufficient to hold that the defendants are guilty of infringement and passing off. In fact, it appears that there seems to be a clear intention of the defendants to show to the general public at large that the impugned mark 'POWRNYM' is another variant/ byproduct/ alternative/ amalgamation of the registered trademark 'NIMYLE' of the plaintiff.

29. The defendants cannot be allowed to take benefit thereof by merely taking note of the essential features of both the competing marks involved and combined into one as the same is impermissible and defies plain logic. Allowing the defendants to do that would result in them reaping undue benefits with no investments from their side, and in this case, even after having earned/ willingly accepted a valuable consideration of Rs.100 Crores from the very same plaintiff. Also, the same is likely to cause immense confusion and deception amongst the minds of the general public as also the members of the trade, especially since the trade channels, the routes/ manner adopted and the end user customer base for both the competing products are the same and as the plaintiff is also the owner of other NIM family of marks for the same products already circulating/ available in the open markets since long.

30. Reliance is placed upon *South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. & Anr.*<sup>22</sup> wherein the Division Bench of this Court has been held as under:-

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<sup>22</sup> 2015 (61) PTC 231 (Del)(DB)



“23. It is also settled that while a trademark is supposed to be looked at in entirety, yet the consideration of a trademark as a whole does not condone infringement where less than the entire trademark is appropriated. It is therefore not improper to identify elements or features of the marks that are more or less important for purpose of analysis in cases of composite marks.

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26. Dominant features are significant because they attract attention and consumers are more likely to remember and rely on them for purposes of identification of the product. Usually, the dominant portion of a mark is that which has the greater strength or carries more weight. Descriptive or generic components, having little or no source identifying significance, are generally less significant in the analysis. However, words that are arbitrary and distinct possess greater strength and are thus accorded greater protection.[174 F. Supp. 2d 718, 725 (M.D. Tenn. 2001) *Autozone, Inc. v. Tandy Corporation*]

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35. The appellant-defendant has strenuously urged that the element 'HAAGEN' alone forms the dominant/essential part of the respondent-plaintiffs registered trademark 'HAAGEN DAZS' and not 'DAZS'. We may however note that the attention of this Court was not drawn to any material that would lend credence to the said submission advanced at the bar. There is nothing on record to support the conclusion that the word 'HAAGEN' has enjoyed greater prominence or primacy vis-a-vis the other elements of the mark in the eyes of the consumers at large or the manufacturer himself and can thus be treated as the dominant element of the respondent-plaintiffs registered trademark. Prima facie, it appears that both the elements constituting the mark of the respondent-plaintiff ['HAAGEN' and 'DAZS'] are equally dominant and are liable to be accorded sufficient protection under the legal framework. The submission is thus liable to be rejected.

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39. It is also a settled proposition of law that where products are virtually identical, as they are in the present case, 'the degree of similarity in the marks necessary to support a finding of infringement is less than in the case of dissimilar, noncompeting products.' [Eaton Allen Corp.(Supra)]... ..”

31. Reliance is also placed upon *Amar Singh Chawal Wala v. M/s. Shree Vardhman Rice*<sup>23</sup>, wherein it has been held as under:-

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<sup>23</sup> ILR (2009) VI Delhi 399





“... .. 17. In the instant case as far as the registered marks in favour of the Plaintiff are concerned, applying the test laid down in *Kaviraj Pandit* it is seen that the essential feature of the mark is the word ‘QILLA’. Whether the word is spelt as QILLA or KILLA, or even written in a different style or colour combination. To the customer who seeks to purchase the QILLA brand rice both names would sound phonetically similar. The customer is likely to ask the retailer: “Can I have the QILLA brand rice?” In the considered view of this Court, it is this essential feature of the Plaintiffs mark, i.e. the word QILLA, which has been adopted by the Defendant No. 1. That the defendants have also used a pictorial representation of the device in the form of a fort also indicates that the Defendants too intended the same meaning to be assigned to the word, which is an Urdu one meaning “fort”. Therefore, though the device QILLA is depicted in a slightly different way by the defendant, it is deceptively similar to the device used by the Plaintiff. Further the use is in respect of the same commodity, rice. Therefore there is every possibility of there being a confusion created in the mind of the purchaser of rice that the product being sold by the Defendant is in fact a product that has emanated from or has been manufactured by the Plaintiff. ... ..”

32. Reliance is also placed upon *Greaves Cotton Limited v. Mr. Mohammad Rafi & Ors.*<sup>24</sup>, wherein it has been held as under:

“24. As noted earlier, the defendant No. 1 himself has admitted in his cross examination that he was manufacturing monoblock pumps, jet pumps, shallow well pumps, coupling pumps, high head pumps, and diesel pumps under the trade name ‘GREAVES INDIA’. It has also come in deposition of PW-1, that the defendants are manufacturing self priming pump, monobloc pump, jet pump, shallow well pump, coupled pump, high head coupled pump, diesel pump etc. and in his application for registration also the defendant No. 1 has claimed use of the mark “GREAVES INDIA” in respect of the above referred products which according to PW-1 are exactly of the same type as are the pumps of the plaintiff company. It thus, stands proved that the mark “GREAVES INDIA” is being used by the defendant No. 1 in respect of the same products for which the mark Greaves is being used by the plaintiff company. The defendant before this Court has thus, been manufacturing and selling the same product under the trade name “GREAVES INDIA”, which the plaintiff company has been manufacturing and selling under its registered trade mark “GREAVES”. By using the word “GREAVES INDIA” the defendant No. 1 lifted and adopted the whole

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<sup>24</sup> 2011 SCC OnLine Del 2596





*of the registered trademark of the plaintiff company, thereby causing infringement of that trade mark. Mere use of the word “INDIA” would make no difference since the word “GREAVES” is not only an essential but also the main component of the trademark “GREAVES INDIA” being used by the defendant No. 1. Use of the word “INDIA” as a suffix and not as a prefix is also a strong indicator that the defendant No. 1 wanted to encash upon the popularity, goodwill and reputation of the word “GREAVES” engines not only in India but in many other countries. In fact had the defendant No. 1 used the word “INDIA” as prefix even that, in my view would have constituted infringement, in facts and circumstances of this case. It would be pertinent to note here that the defendant No. 1 has not given any reason or explanation for use of the word “GREAVES” which is the most essential component of his trademark. During cross examination, he could not even give any meaning to the word “GREAVES”. This clearly shows that the adoption of the word “GREAVES” by the defendant was dishonest, actuated with the intention to encash upon the tremendous reputation which the registered trademark of the plaintiff enjoys in the market. It would also be appropriate to note here that “GREAVES” is not a dictionary word and is alleged to be the surname of the founder of the plaintiff company. Neither deletion of a part of a registered trademark nor the prefix or suffix of another word to it would validate the use of the registered mark by an unlicensed user, once it is shown that the part used by the infringer is an essential part of the registered trademark. ... ..”*

33. Reliance is also placed upon ***P.K. Overseas v. Bhagwati Lecto***<sup>25</sup> wherein, in identical facts, the Hon’ble Division Bench of this Court granted injunction for adopting the essential features of two trademarks in one holding as under:-

*“20. It is often argued in trademark infringement cases that the trademark has to be considered as a whole and has not to be dissected. That is to say the anti-dissection rule is brought into force. On the other hand the theory of a dominant part of a trademark is propounded which essentially requires a Court to look at the trademark compositely but identify if any part thereof is the dominant part. To a layman it may appear to be a legal paradox, for on the one hand there is a rule that you cannot dissect a composite mark and on the other hand you have a rule which has the feature of dissecting. In the decision reported as 2015 (61) PTC 231 South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. this issue was addressed by a Division Bench of this*

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<sup>25</sup> 2016 SCC OnLine Del 5420



*Court with respect to same products i.e. ice cream. The rival marks under consideration were 'HAAGEN-DAZS' and 'D'DAAZS'. Propounding the rule of anti-dissection to contend that the respondent's mark 'HAAGENDAZS' should be viewed as an indivisible whole and when viewed in its entirety, it was not deceptively similar to the impugned trademark 'D'DAAZS', the rival argument was that 'DAZS' formed a prominent part of the trademark 'HAAGEN-DAZS' and therefore warranted protection against the impugned trademark. The Division Bench then referred to various judicial decisions and opined that the rule of anti-dissection essentially mandates that where the issue is of deceptive similarity between composite marks, the commercial impression of the mark as a whole needs to be considered for the reason the jurisprudence behind the anti-dissection rule was that the combination of the terms in its entirety and not its dissected elements constitute the distinctive mark. The Division Bench then referred to the decision reported as 211 (2014) DLT 296 Stiefel Laboratories v. Ajanta Pharma Ltd. and therefrom extracted the rationale for the anti-dissection rule: 'The rationale of the anti-dissection rule is based upon this assumption: 'An average purchaser does not retain all the details of a mark, but rather the mental impression of the mark creates in its totality. It has been held to be a violation of the anti-dissection rule to focus upon the 'prominent' feature of a mark and decide likely confusion solely upon that feature, ignoring all other elements of the mark. Similarly, it is improper to find that one portion of a composite mark has no trademark significance, leading to a direct comparison between only that which remains.' In view of the aforesaid, the Division Bench opined that the principles of 'anti-dissection' and that of 'identification of 'dominant mark' are not antithetical to one another but are rather complimentary. It was held that the constituent elements may be viewed as a preliminary step in ultimately determining probable customer reaction to the conflicting composites as a whole. The Division Bench expounded that the rule of anti-dissection does not absolutely restrict consideration of the constituent elements of a composite mark and more significantly, where less than the entire trademark was appropriated amounting to infringement thereof, there would be no violation of the anti-dissection rule. Reliance was placed on the decision reported as 380 F.3d 1340 Re Chatam Int'l, Inc, where the Court held that the commercial impression created by the dominant part 'GASPAR' of the registered mark 'GASPAR'S ALE' was far more substantial than by its other part 'ALE and therefore the impugned mark 'JOSE GASPAR GOLD' was found to be deceptively similar to the registered mark. Reference was then made to decision reported as 405 F. Supp. 530 (1975) Eaton Allen Corp. v. Paco Impressions Corp where it was held that consideration of a trademark as a whole does not preclude infringement where less than*



*the entire trademark is appropriated. In the facts of the case, the Division Bench, rejected the appellant's arguments advanced on the basis of the anti-dissection rule to hold that the impugned mark 'D' DAAZS' infringed a dominant feature i.e. 'DAZS' of the respondents' trademark 'HAAGEN' 'DAZS' which feature can be easily relied on to trace the source of its product and therefore must be accorded protection. Thereafter, noting that the expression 'HAAGEN DAZS', was a unique combination of Danish-sounding words having no dictionary meaning in any language, the Division Bench reiterated that being an arbitrarily chosen trademark, the same was entitled to a high degree of protection and referred to the decision of this Court reported as 2010 (44) PTC 293 (Del) Kirorimal Kashiram Marketing and Agencies Pvt. Ltd. v. Shree Sita Chawal Udyog Mill in support thereof. The Division Bench highlighted that the consumer generally retained only a vague impression of a mark to ascertain its similarity upon encountering a new rival mark. Interestingly, the Division Bench imported the 'ordinary observer' test in copyright law to hold that this principle could be adopted if a dominant part of a trademark which had acquired a goodwill had been adopted by the defendant."*

34. Applying the above analogy to the identically similar bottles with the very same get up, style and shape adopted and used by the defendants, it is once again hard to dwell upon as to why they chose them as that of the plaintiff. This is another aspect for which the defendants can be said to be guilty of infringement and passing off.

35. In both the aforesaid cases of adopting the impugned mark as also the get up, style and shape of the bottles of the plaintiff, any prudent person/ entity like the defendants who have been in the similar business for more than *twenty years* is expected to be acting with more caution, circumspection and care, especially whence they are not fly by night operators and have got a valuable consideration of Rs.100 Crores from parting ways with plaintiff.

36. Interestingly, it is also not in dispute that all parties have duly acted in terms of all the aforesaid agreements, particularly *Agreement IV* and



*Agreement VI*. Having admitted all the aforesaid binding agreement executed *inter se* the parties, they are all bound by each and every term(s) contained therein. It is thus the bounden duty of all the defendants to adhere to the terms thereof in letter and spirit.

37. As such, in terms of Clause 9.9 of the *Agreement I* when the defendant no.1, for and on behalf of all the other defendants herein, undertook not to “... ..*manufacture, packaging, testing, development, marketing, distribution, or sale of any products that compete, directly or indirectly, with any of the Products in the Territory for a period of four years... ..*” and the same was only possible “... ..*except if such activities are carried out pursuant to an agreement with ITC, or with prior written consent of ITC.*” Further, even otherwise the defendant no.1 was “... ..*free to manufacture and market soaps, liquid handwash or insect repellent for use in agriculture without infringing and/ or passing off the intellectual Property rights of ITC.*”. Interestingly, it is not the case of the defendants that either of them ever entered into any kind of agreement(s) with the plaintiff or had any kind of written permission from it ever after the execution of the aforesaid agreements *inter se* themselves.

38. Thus, in the considered opinion of this Court, there has been a lapse on the part of the defendants and they are trying to take undue benefit by wriggling out of the aforesaid agreements by not acting in terms thereof. Or else, the defendants would have acted by exercising their rights in terms of Clause 9.9 of the *Agreement I*, more so, since they were always entitled to deal in the same products as that of the plaintiff. Having not done so, raises another doubt in the mind of this Court.



39. Although the defendants have raised an issue *qua non-maintainability* of the present suit within the jurisdiction of this Court, no emphasis was laid by the learned counsel for the defendants at the time of making his submissions thereto. Be that as it may, the plaint is accompanied by an Invoice exhibiting purchase of a floor cleaner under the impugned mark 'POWRNYM' from Chittaranjan Park, New Delhi, within the jurisdiction of this Court. The issue *qua veracity* thereof is left open for adjudication at the time of trial. In any event, it is also the case of the plaintiff that the advertisement of the impugned 'POWRNYM' were telecasted on the television show 'Didi No.1' telecasted on the Zee Bangla Channel. Also, the products of the defendants under the impugned mark 'POWRNYM' is also available on the third-party interactive websites having commercial operations, and which are accessible within the jurisdiction of this Court.

40. In view of the aforesaid, the present suit is very much maintainable before this Court.

41. The issue *qua* the plaintiff having not taken action(s) and/ or not initiated suit(s) against other similarly situated third parties as the defendants is also well settled now. The plaintiff needs not to go against each and every person/ entity infringing and/ or passing off its trademarks. Reliance is placed upon *Pankaj Goel v. Dabur India Ltd.*<sup>26</sup> and *National Bell Co. v. Metal Goods Mfg. Co. (P) Ltd. & Anr.*<sup>27</sup> wherein it has been held that the proprietor of a trademark need not take any action against infringement which do not cause prejudice to its distinctiveness and use of

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<sup>26</sup> 2008 SCC OnLine 1744

<sup>27</sup> 1970 (3) SCC 665



a similar mark by a third party in violation of the plaintiff's right is no defence.

42. The same is, thus, in the considered opinion of this Court, no ground for denying an injunction to the plaintiff. More so, since the plaintiff is always free to choose whom to proceed against.

43. The plaintiff has not used/ is not using the registered trademark 'JOR-POWR' is no ground to deny injunction, particularly, since the plaintiff is the holder of the registration for the same. A reading of *Section 18* of the Act bears that the applicant claiming to be a proprietor of a trademark can apply if it is being used or if it is proposed to be used. Thereby meaning, an actual use is not necessary to acquire proprietary right in a trademark and the mere proposal/ intention of such use and applying for the same is sufficient. Reliance is placed upon *Four Pillars Enterprises Co. Ltd. v. Mahipal Jain & Ors.*<sup>28</sup>.

44. Otherwise also, the defendants are not entitled to raise the plea of invalidity of the said registered trademark 'JOR-POWR' in view of the aforesaid agreements entered *inter se* them with the plaintiff from time to time.

45. Further, merely because the plaintiff had not filed any objection before the trademark Registry with respect to the application for registration of the impugned mark 'POWRNYM' of the defendant no.1, is hardly of any relevance, particularly since it cannot overcome the dishonesty of adoption thereof by the defendants.

46. Lastly, reliance placed by the learned counsel for the defendants

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<sup>28</sup> 2024: DHC: 2478





upon *Rhizome Distilleries P. Ltd & Ors. v. Pernod Ricard S.A. France & Ors.*<sup>29</sup> is misplaced since the Court therein was dealing with a common dictionary word ‘Imperial’ whereas in the present case, this Court is called upon to adjudicate upon the two registered trademarks of the plaintiff ‘NIMYLE’ and ‘JOR-POWR’ as also the impugned mark of the defendants ‘POWRNYM’, which are coined words, not found in the dictionary coupled with the deceptively similar get-up/ trade dress thereof.

47. Lastly, taking into consideration the gamut of facts, especially the past long history involved holistically, there is no violation of *Section 12A* of the Commercial Courts Act, 2015.

**Findings:**

48. In view of the aforesaid facts and circumstances, analysis as also the position in law, all the defences taken/ raised by the defendants and/ or grounds for vacation of the order of *ex-parte ad interim* injunction dated 05.10.2023 passed in favour of the plaintiff are rendered otiose. The plaintiff has, in fact, been able to make out a *prima facie* case in its favor, more so, since the defendants have knowingly adopted the impugned mark ‘POWRNYM’ after having given all their rights *qua* the earlier registered trademarks ‘NIMYLE’ and ‘JOR-POWR’ to the plaintiff for good and against a valuable consideration of Rs.100 Crores.

49. In view of the analysis and reasoning hereinabove, the overall *balance of convenience* lies entirely in favor of the plaintiff and against the defendants, particularly in view of the undisputed fact that the defendants assigned all their rights, title and interest in and to both the

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<sup>29</sup> 2009 SCC OnLine Del 3346





registered trademarks 'NIMYLE' and 'JOR-POWR' to the plaintiff for a valuable consideration of Rs.100 Crores. Under the existing circumstances, if the defendants are not restrained, the same shall result in causing *irreparable harm, loss and injury* to the plaintiff for which it cannot be compensated financially and/ or otherwise. Contrarily, considering the stature and position of the defendants, there is hardly any hindrance going to be caused to the existence and/ or established business of the defendants.

50. Moreover, the defendants are guilty of passing off the products/ marks previously owned by them, which in effect shall create an utter confusion in the minds of the general public who are likely to believe that the products of the defendants under the impugned mark 'POWRNYM' is also emanating from the house of the plaintiff and is a mere variation of the registered trademarks 'NIMYLE' and 'JOR-POWR' to the plaintiff. Cumulatively taken, none of the aforesaid can be permissible/ allowed.

51. Thus, the application under *Order XXXIX rules 1 & 2 CPC* of the plaintiff is allowed and till the pendency of the present suit, the defendants, and all those acting on their behalf are restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any natural cleaning products including but not limited to floor cleaners under the impugned mark 'POWRNYM' and/ or any other mark which may be identical to or deceptively similar with or derived or be an imitation of the plaintiff's registered trademarks 'NIMYLE', 'JOR-POWR' and/ or any of 'NIM' family of marks, and/ or any unauthorized use of the mark/ label/ packaging/ get-up/ trade dress which is a colourable imitation and/ or a substantial reproduction of the plaintiff's



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NIMYLE label/ packaging/ get-up/ trade dress, in any manner whatsoever, as the same is likely to cause confusion and/ or deception, thereby, amounting to infringement of the plaintiff's registered trademarks, copyright and passing off.

52. Accordingly, the application under *Order XXXIX rules 1 & 2* CPC of the plaintiff is disposed of as per the aforesaid terms.

53. In view thereof, the application under *Order XXXIX rule 4* CPC of the defendants is dismissed.

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54. Put up for admission/ denial of documents before the learned Joint Registrar on 28.11.2024.

**SAURABH BANERJEE, J.**

**OCTOBER 08, 2024**

**rr**